No. 96-1620

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

BRET SCHUNDLER, in his official capacity as Mayor of the City of Jersey City, THE CITY COUNCIL OF JERSEY CITY, and THE CITY OF JERSEY CITY, NEW JERSEY,

Petitioners,

—v.—

AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, on behalf of its members, ROBERT LANDER, ADAM JACOBS, JOEL SOLOW, and ANN SORREL,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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May 12, 1997

COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in finding that government owned Nativity Scene and Menorah displays, erected by order of the mayor on government property in front of the seat of local government power, communicated government endorsement of religion?

2. Did the Court of Appeals err in ordering the District Court to reevaluate the constitutionality of the religious displays at issue, without reference to the perceived "demystifying" and "desanctifying" powers of various secular accompaniments?

LIST OF PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES

Co-Respondent American Civil Liberties Union of New Jersey is a not-for-profit corporation organized under the laws of the State of New Jersey. It has no parent company or subsidiaries, and is affiliated with the American Civil Liberties Union, Inc., a not-for-profit corporation organized under the laws of the District of Columbia.

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Respondents American Civil Liberties Union of New Jersey, Robert Lander, Adam Jacobs, Joel Solow, and Ann Sorrel respectfully submit this brief in opposition to the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit.

COUNTERSTATEMENT OF THE CASE

The relevant predicate facts of this case are essentially undisputed, and can be quickly stated. The City of Jersey City purchased, with public funds, a Nativity Scene, depicting for Christians the birth of the Son of God in the manger in Bethlehem. It also acquired, with public funds, a menorah, commemorating for Jews the Miracle of the Oils during the rededication of the Temple of Jerusalem. (4a-5a). Each year during the holidays of Christmas and Hanukkah respectively, the City erects these displays on the Plaza lawn in front of Jersey City Hall, the seat of local government, accompanied by a Christmas tree and, recently, a sign (5a). The City Hall Plaza lawn is not dedicated for expressive use by the public, and the record does not reveal other instances in which unattended displays, whether public or private, have been permitted on the City Hall Plaza lawn. It is undisputed that these displays are purely government speech. *(Id.)*

After attempts at informal resolution with the City failed, the ACLU of NJ and four individual plaintiffs who reside or work in Jersey City brought suit in the Superior Court of New Jersey on December 21, 1994, seeking injunctive relief based both upon the United States and New Jersey Constitutions. Defendants removed the action to the United States District Court for the District of New Jersey. On cross motions for summary judgment, the District Court on

November 28, 1995, granted summary judgment to plaintiffs ACLU-NJ *et al.*, based both upon the Establishment Clause of the First Amendment to the federal constitution, and Article 1, § 4 of the New Jersey State Constitution ("There shall be no establishment of one religious sect in preference to another. . . .").

Notwithstanding the District Court's injunction against the original displays as violative of the Establishment Clause, in 1995 the City again erected the Nativity Scene and menorah, now accompanied by a four-foot plastic figurine of Santa Claus lashed with wire to a nearby tree, a similar plastic figurine of Frosty the Snowman, and a red sled. Furthermore, a tree was decorated with ornaments said to commemorate Kwanzaa.

On December 18, 1995, the District Court upheld these modified displays, finding that the presence of the secular symbols of Santa, Frosty and the sled "demystified" and "desanctified" the Nativity Scene and the menorah. (57a.) It therefore modified its prior order and permitted the new display with additional figurines. However, since the District Court found that the new additions were "of such flimsy construction, and some were so carelessly erected that they are an obvious prey to vandals and the elements," it further ordered that if any of the demystifying and desanctifying elements should be lost or destroyed, it must be replaced within 24 hours. (57a-58a.)

Mayor Schundler and the City appealed both the original November 28 order and the December 18 order prohibiting the original display. The ACLU and individual plaintiffs cross-appealed the December 18 order. On appeal,

the United States Court of Appeals for the Third Circuit affirmed the District Court's original decision that the City's display of the Nativity Scene and menorah in front of City Hall communicated government endorsement of religion. It vacated the District Court's second modified order, however. Finding that the District Court's "demystification" and "desanctification" tests incorrectly stated applicable law, it remanded the case to the District Court for a further determination as to whether the modified displays were constitutional under the "endorsement test" set forth in its opinion, which in turn rearticulated the tests laid down in *Lynch v. Donnelly*, 465 U.S. 668 (1983); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995). Jurisdiction over this case therefore returned to the District Court when the mandate of the court of appeals issued, and the trial judge is currently in a position to proceed with further hearings to determine the constitutionality of the modified display.

REASONS FOR DENYING THE PETITION

Petitioners ask the Court to revisit an issue that it has addressed three times in recent years -- the constitutionality of holiday religious displays under the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668 (1983); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573 (1989); and *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995). Having laid out in detail the framework by which such religious display cases should be decided by the lower courts, there is no "compelling reason" (Sup. Ct. R. 10) for the Court to accept review on one

of the innumerable factual permutations that fall within that framework.

1. Petitioner's Argument Is Based Heavily on Factual Interpretation.

After considering the testimonial, documentary, and photographic evidence concerning the displays and the City's practices with regard to the Plaza lawn, the Court of Appeals concluded that the original display both communicated government endorsement of religion (24a-29a), and promoted excessive entanglement of government with religion (29a-32a). In so finding, the Third Circuit was merely following the analytical steps required by *Allegheny*. This process is necessarily fact-sensitive. "[T]he endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice and, like any test that is sensitive to context, it may not always yield results with unanimous agreement at the margins." *Allegheny*, 492 U.S. at 629 (O'Connor, J., concurring). This case does not tread anywhere near those margins, however, and there is little purpose to be served in granting review merely to calibrate the Court of Appeals' contextual sensitivity, where it has demonstrated its understanding of "the need to focus on the specific practice in question in its particular physical setting and context in determining whether government has conveyed or attempted to convey a message that religion or a particular religious belief is favored or preferred." *Allegheny*, 492 U.S. at 637. *See Federal Trade Comm'n v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (Supreme Court should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations").

In *Allegheny*, the Court invalidated a privately owned Nativity Scene located on the central steps of a county courthouse. After considering the entire physical context of the display, the Court found that the Nativity Scene communicated government endorsement of religion, despite the presence of nearby secular displays.

> The presence of Santas or other Christmas decorations elsewhere in the county courthouse, and of the nearby gallery forum, fail to negate the endorsement effect of the creche. The record demonstrates clearly that the creche, with its floral frame, was its own display distinct from any other decorations or exhibitions in the building.

Allegheny, 492 U.S. at 598 n.48. *Allegheny*, of course, also upheld the display of an 18 foot privately owned menorah next to a 45 foot decorated Christmas Tree and a "Salute to Liberty" sign, all located in the entrance arch of the county administration building. After finding that the tree was "clearly the predominant element in the city's display" (*id.* at 617), the Court concluded that the overall impact of the display was secular. As Justice Blackmun himself noted in *Allegheny*, however, "The display of a menorah alone might well have that effect [of endorsement]." *Id.* at 616 n.64. Here, the Court of Appeals concluded that display of a publicly owned menorah which constituted its own focus point, in front of the most visible seat of local government power, and without the presence of another predominant element, led to a different conclusion. These contrasting results merely highlight the highly fact sensitive nature of the inquiry, and the fruitlessness of asking this Court to make

yearly contributions toward an eventual compendium of permissible and impermissible religious displays.

2. The Facts of this Case Do Not Present an Issue of Undecided Law.

For the Court to accept review on yet another religious display case, one would imagine that it presents a remarkable or at least unexplored area of the law. Wherever the doctrinal "frontiers" of government religious display cases may currently be, however, they have long since traversed the territory that the City now asks the Court to visit.

In *Lynch*, the Court determined that a government owned Nativity Scene that was erected on *private* property not located near public government buildings did not violate the Establishment Clause, when presented in the context of a large number of separate secular displays that were each individual focal points as well as part of an overall "winter wonderland" holiday display. Then, in *Allegheny*, the Court struck down one *privately owned* religious display but upheld another, based upon the overall message vel non of endorsement that each conveyed. And most recently, in *Capitol Square Review and Advisory Board v. Pinette*, 115 S. Ct. 2440 (1995), the Court sustained respondent's right as a *private* citizen to engage in religious speech on government property that was designated as a public forum, even though located in front of the symbolic backdrop of the statehouse.

No cases decided by this Court, however, have ever sanctioned a government financed, government owned, government erected religious display located on government

property in front of the symbolic seat of civic secular power.[1] Yet it is undisputed that this case involves exactly that: religious displays that are government owned, located on government property that is not a public forum, and situated in front of the symbolic backdrop of City Hall, the seat of local government. This case thus collects and concatenates the most constitutionally problematic elements from each of the prior cases, and poses a question that all except the City of Jersey City would have assumed was answered long ago. The answer of the Court of Appeals to this question should be more than sufficient for the City to draw the appropriate conclusions, and there is no need for this Court to recount the candy canes and tinsel in order to emphasize that conclusion.

3. This Case Presents No Conflicts Among the Courts of Appeals.

Certiorari is granted only in cases involving matters of public importance that transcend the interests of the private parties, and in cases where there is real and substantial conflict between courts of appeals. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951) (certiorari granted only in "cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal"). Comparison of this case with the decisions from other circuits cited by the

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1. The City apparently does not rely at all on the alleged effects of Santa, Frosty and the sled in the constitutional analysis, since the petition does not make reference to the modified display in its argument. While the ACLU agrees with the Third Circuit that the "token additions of the secular symbols do little to alter the 'context' or focal points of the City's display" (35a), the absence of these elements in the display the City seeks to defend makes the constitutional result even clearer. Moreover, whatever their importance may be as cultural icons, Santa and Frosty simply do not merit the plenary judicial attention of the Supreme Court.

Petitioner, however, merely supports the unremarkable proposition that cases with diametrically opposite facts often lead to different results.

The present case deals with *government* speech on government property that is at most a *nonpublic* forum, if indeed it is a forum *at all*. Most of the so-called conflicting decisions from other circuits cited by the City, however, involve *private* speech on property either assumed or found to be a *public* forum, where First Amendment free speech rights are implicated. *See Creatore v. Town of Trumbull*, 68 F.3d 59 (2d Cir. 1995) (per curiam) (remanding to district court in light of *Pinette*); *Chabad-Lubavitch of Georgia v. Miller*, 5 F.3d 1383 (11th Cir. 1993) (in banc); *ACLU of Kentucky v. Wilkinson*, 895 F.2d 1098 (6th Cir. 1990).

Creatore, *Chabad-Lubavitch*, and *Wilkinson* either presaged or flowed from this Court's decision in *Pinette*. The ACLU of course in no way questions the wisdom of the decision in *Pinette*. (It would be ironic if it did so, given that it represented the prevailing party before this Court in that case.) Indeed, *Pinette* stands for a core canon of first amendment jurisprudence, i.e. that the rights of free expression in a public forum cannot be abridged unless justified by compelling state interests. This case obviously presents no opportunity to explicate on this issue, however, since it involves *government* speech, and absent assertion of such an *individual* right, no countervailing constitutional value is involved.

Of the other cases decided by courts of appeals that Petitioners cite as conflicting, none are relevant or factually apposite. *Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir.

1996), dealt with erection of a sculpture of an Aztec mythological figure that the court found was not even "religious" in nature. In *Gaylor v. United States*, 74 F.3d 214 (10th Cir. 1996), challenge was brought to the national motto "In God We Trust" on United States currency. The motto was upheld based on its peculiar historical and ceremonial usage in solemnizing public functions without denominational preference, which facts clearly distinguish it from a portrayal of the infant Jesus or the Miracle of the Oils. The only case cited by Petitioner that presents facts arguably similar to those at issue here is *Doe v. City of Clawson*, 915 F.2d 244 (6th Cir. 1990). There, the court of appeals upheld a public display of a nativity scene in front of a city hall that appeared in a context completely different from that present in Jersey City.

> The display also includes four evergreen trees with lights and stars, two Christmas gift packages with large bows, a Santa Claus figure standing nearby at the corner of the building, a large "Noel" sign, and holiday roping on the building. Decorated lampposts, "Seasons Greetings" sign, roping, colored lights and candles adorned the public library across the street from the Clawson City Hall. . . . . At oral argument, counsel for plaintiff-appellant John Doe acknowledged that the entire display includes the public library and its decorations.

915 F.2d at 245-46. *City of Clawson* may or may not have been correctly decided, but if there is tension with this case, it is factual in nature.

CONCLUSION

For the reasons expressed herein, the petition for writ of certiorari to the United States Court of Appeals for the Third Circuit should be denied.

May 12, 1997

Respectfully submitted,

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